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To: United States Environmental Protection Agency,
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From: Jeff Hoogendoorn, Information Systems Administrator
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Attn: Docket Number EC-2000-007

Addr: 1200 Pennsylvania Avenue N.W.
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Date: February 7, 2002

Re: Comments by the Oklahoma Department of Environmental Quality on the proposed rule to establish electronic reporting and record keeping (CROMERRR).

The Oklahoma Department of Environmental Quality (ODEQ) is encouraged that the Environmental Protection Agency (EPA) recognizes the importance of adopting electronic reporting and record-keeping practices. Generally speaking, the use of electronic means to manage and transfer information has many benefits that we endeavor to take advantage of. It is also agreed that a performance measure approach to setting expectations for the rule is preferred over specifying platform-based criteria. However, in some instances the stated performance measures are more consistent with the legal objective of maintaining a "paper trail" than the reality of instituting such a system in the electronic world. For this reason, it is requested that EPA establish a working system certified to meet the requirements of CROMERRR or document a few examples of systems that would pass the certification process so that state effort could follow the approved blueprint.

The ODEQ has reviewed the proposed rule and participated in open forum discussions with representatives from EPA and other states. A compilation of issues generated from these discussions has been compiled by the National Governors Association and is being submitted to the EPA pursuant to the request for public comment. The ODEQ is in agreement with the comments compiled by the NGA (see attached). Clarification specific to various issues is provided below.

SUBPART A – GENERAL PROVISIONS

3.1(a-b) - In other words, long-term retention and maintenance of records would involve only the data received rather than the ability to maintain a system that would reproduce the exact screens, submittal process, etc. utilized in the initial submission of the data.

3.10(a-b) - No additional comment.

SUBPART C – ELECTRONIC RECORDKEEPING UNDER EPA PROGRAMS

3.100(a) - This issue ties in with the issue in Subpart A, wherein it is supposed that the receiving agency (in this case ODEQ), could meet the objective for the reporting entities long-term record keeping objective by virtue of the reported data being maintained unadulterated on the state system. It should be pointed out that there are two distinct data sets in question here; one being the routine data collected by the reporting entity and the other being the summarized information reported to the State/EPA. Extending this recording keeping responsibility to include the routine, and considerably more voluminous data would require significantly increased hardware capacity and potentially an additional component to the "reporting tool".

SUBPART D – ELECTRONIC REPORTING AND RECORDKEEPING UNDER EPA-APPROVED STATE PROGRAMS

3.1000(b) - This idea is related to the concept of "Self Certification". The ODEQ requests further information as to specifically how certification will be addressed.

3.2000(d)(5) - Agreed. The onus should lie with the regulated entity to adhere to the registration process, which should include an agreement on their part that they will maintain authorization according to the specified requirements.

3.2000(e)(1)(i) - Agreed. This is an issue that was raised by ODEQ over a year ago. It is expected that certain submissions will contain numerous (hundreds?) records with many fields each. These fields likely contain numerical data that, although readable, would be little more than page after page of numbers, which would be next to impossible to clearly decipher as meaningful information. It is for precisely these types of situations technology is applied to a process. It is the burden and responsibility of the implemented system (by design) to accurately translate information.

3.2000(e)(1)(ii) - Again it is the implemented system which is certified. Rather than record the warnings, layouts, etc. for each submittal, it should suffice by virtue of the (self)-certification documentation that patrons of the reporting system are faced with this or that display/warning, submittal flow, etc.

3.2000(e)(3) - See above

3.2000(e)(3)(iii) - Suggestion: Consideration should be given to allowing a receiving agency (or EPA) the option of issuing an electronic signature method rather than relying on a third party certificate authority. The very long-term nature of the data retention requirements coupled with the uncertain future of any particular private business, would make reliance on a third party system risky.

3.2000(f)(1) - The very nature of the internet is such that routing is generally not "as the crow flies", i.e., there will always be many "hops" that a packet takes to get from point A to point B. Additionally, a submission will consist of many packets that may not necessarily take the same path. Presuming the intent of this criterion is to prevent tampering of a file while in route, it is the encryption of the file with its associated signatory keys that prevent it from being altered without detection. Therefore, this step seems unnecessary.

3.3000(b)(a) - No additional comment.

CROSS MEDIA ELECTRONIC REPORTING AND RECORD KEEPING RULE PUBLIC COMMENT RESPONSE

DRAFT

BENEFITS OF THE RULE

States are enthusiastic about many aspects of the Cross Media Electronic Reporting and Record Keeping Rule (CROMERRR). It is apparent through the various draft proposals, that EPA and the other entities involved have attempted to draft a policy that is performance-based rather than technology based. States have expressed that a technology-neutral rule allows flexibility, which may facilitate the reporting process. States have also indicated that the performance and data validity criteria are well stated and appropriate in regard to their purpose and function. Also, the submitter registration process seems suitable to properly authenticate an individual who would certify and submit information electronically.

CRITIQUE OF THE RULE

SUBPART A – GENERAL PROVISIONS

3.1(a-b) – The wording in the proposed rule does not appear to limit the use of printed paper records from being used for record keeping purposes, even where the original record was electronically created as is the case for electronic (digital) data acquisition systems which may be used for monitoring data collection. EPA should make sure that this rule does not preclude the use of printed records to satisfy record-keeping requirements when the records were originally created in digital or electronic form by data acquisition systems. Similarly, EPA should clarify that the record-keeping requirements in this rule are not applicable to electronic data acquisition systems. Rather, these record-keeping requirements should only be applicable to the final electronic record(s) created for electronic submissions subject to this rule. It seems likely that broadly applying these record-keeping requirements and those in S. 3.100 to electronic/digital data acquisition systems and their resulting electronic records is beyond the original scope of this rule making.

SUBPART B – ELECTRONIC REPORTING TO EPA

3.10(a-b) – It appears that EPA's CDX system or any EPA system designated under S. 3.10(b) would not have to meet the performance requirements of S. 3.2000. EPA should ensure that the rule requirements for acceptable electronic document receiving systems under S. 3.2000 are equally applicable to EPA as well as state, tribal, or local environmental programs. If EPA does not apply performance criteria equally to their own systems, then the rule's credibility will be subject to conjecture from third parties who may wish to challenge the enforceability of electronic data accepted by systems which do meet the requirements of S. 3.2000.

SUBPART C – ELECTRONIC RECORDKEEPING UNDER EPA PROGRAMS

3.100(a) – Each of these requirements for acceptable electronic records appears to be generally reasonable and necessary, particularly for State electronic record-keeping systems. Unfortunately, however, these requirements may be a significant impediment to streamlining efforts and to implementation of electronic reporting programs if regulated entities are individually required to develop systems that meet all of these requirements. In particular, many regulated facilities will not have the IT infrastructure to generate the necessary protections for preventing document alterations, exercision or copying of electronic signatures, nor the audit trails to demonstrate that any protections have been effective.

Accordingly, it is desirable that agency receiving systems be able to provide services which may be used by the regulated entity to implement many of these requirements for acceptable electronic record keeping. For example, the agency receiving system can provide services where the agency receiving system is used by both the agency and regulated entity as the system which maintains the unalterable and secure electronic documents, including the requisite audit trails.

In the preamble for the final rule, EPA should make it clear that these record keeping requirements can be met based on systems maintained by either the receiving agency, the regulated entity, or a combination of both that fully meet the requirements of this section. It may be useful to clarify this directly in the regulation by stating: "These requirements may be satisfied by a record-retention system that is maintained by the receiving agency, the regulated entity, or a combination thereof." By clarifying this flexibility, EPA will be able to mitigate concerns that are likely to be expressed by the regulated entities when considering the burden necessary to implement and comply with these requirements.

SUBPART D – ELECTRONIC REPORTING AND RECORDKEEPING UNDER EPA-APPROVED STATE PROGRAMS

3.1000(b) – It is suggested that the language in 3.1000(b) be modified to state that, "the State, tribe, or local government must demonstrate, in writing, that electronic reporting…" Similarly, EPA should work with states to develop guidance suggesting the format and example content sufficient to demonstrate how an electronic record receiving system can meet the performance requirements in this rule.

3.2000(d)(5) – This regulation should not explicitly require that the registration process must require that a registrant's information be renewed at specified intervals or at intervals specified from time to time by the Administrator. Doing so is unnecessarily prescriptive and burdensome to the regulatory agency. For example, 40 CFR 122.22(c) clearly places the burden for maintaining current signatory authorizations with the

regulated party. In contrast, the proposed regulatory approach creates an unnecessary burden on the regulatory agency to administer a process for periodically renewing Electronic Signature Agreements regardless of the need.

In addition to being an unnecessary regulatory burden that is in conflict with acceptable regulatory approaches for maintaining current signatory authorizations, the proposed language in 3.2000(d)(5) does not clearly define a level of performance for a sufficient "Receiving System."

It is recommended that 3.2000(d)(5) be deleted from the final regulation in its entirety for the reasons stated above. Alternatively, the regulation could be altered to say that the registration process must, "(5) result in records of current information on the registrant's identity, the entity or entities for which the registrant is authorized to represent, and the registrant's electronic signature agreements, including any changes to these records that may occur from time to time."

3.2000(e)(1)(i) – This regulation requires that the receiving system provide an onscreen review of the data "to be transmitted" and the associated contextual labeling information before the electronic signature is affixed. This proposed requirement is unnecessarily burdensome since it is the reporting entity's responsibility for examining and being familiar with a submission's content, in order to certify its truth, accuracy, and completeness, prior to signature. The wording of the existing NPDES certification statement has established a legal precedence for the level of review by a certifier that has consistently been relied upon for summary dismissal of attempts by regulated entities to repudiate their previously reported self-motoring data in criminal, civil, and administrative proceedings. The NPDES certification statement does not impose a requirement that the individual paper forms be individually reviewed. Rather, the certification statement requires that the person state that he/she, "has personally examined and is familiar with the information submitted..." Therefore, the regulation should not dictate that the Receiving System be responsible for providing the functionality for this examination process. Instead, this burden and responsibility for review should rest solely with the regulated entity and its use of its own systems to generate, review, and accurately translate information into acceptable electronic reporting files for submission. The imposition of a portion of this burden on the regulatory agency is unnecessary and jeopardizes or weakens existing case law supporting the non-repudiation of self-monitoring data.

In addition to critical legal concerns, it is requested that EPA describe how this requirement can be practically implemented using thin-client web-enabled system architecture. In Web-enabled system designs that intentionally do not have significant client components, the human-readable display function can not and should not be required until the file is electronically transferred and accepted by the state's electronic reporting system.

Accordingly, any requirement that a system be designed to be able to display on-screen human-readable pages prior to affixation of the electronic signature and/or submittal should be removed from the final regulation. Additionally, individual state regulatory programs should be left with the ability to require that electronic signatures and certifications be performed prior to submittal.

However, it is believed to be very important that the each transmitted electronic report contain sufficient labeling and descriptive information equivalent to that which would otherwise be included on the paper form. For example, for NPDES DMRs, the electronic submittal must not contain just the data or responses, but, should also contain the associated permit limitations and related descriptive information that are necessary for the permittee to certify their compliance status relative to limits, etc. as indicated on the DMR. Accordingly, the proposed requirement of 3.2000(e)(1)(i) should at least not be applicable where the submitted electronic record contains all of the equivalent labeling and descriptive information that would otherwise be included on the paper form.

3.2000(e)(1)(ii) – The certification statement should not be required to be exactly identical to that which would be required for paper submission. Rather, it is reasonable to state, "A certification statement must, at a minimum, include a certification statement that is identical to that which would be required for a paper submission of the information..." That way, the regulation will not preclude any predicates or additional language that a state wishes to include in its electronic certification statement.

While it is practical for the name of the submitter to be displayed in many systems designs, it is unnecessarily prescriptive for this regulation to prescribe the nature of onscreen warnings or layouts. At most, the regulation should require that the certification statement must be displayed during the signature process and that the certification statement should require positive acknowledgement as part of the signature/certification scenario.

3.2000(e)(3) – It is not practical, nor necessary for each "copy of record" to include all of the online warning and instructions that are presented during the signature/certification scenario. At most, the copy of record should include documentation to uniquely reference the version for the electronic receiving system that produced the onscreen warning and related instructions during submittal.

3.2000(e)(3)(iii) – It is unclear what is meant by, "agency electronic signature." Does this mean a signature identifying the agency, or an electronic signature issued by the agency? There does not appear any value in affixing an electronic signature identifying the agency to each of the submitted records. It may be useful to change the wording to, "Has an agency issued electronic signature affixed that satisfies the requirements for electronic signature method..."

If this wording is intended to mean the electronic signature identifying the agency, then it is requested that EPA provide an example of the benefit and a procedure for implementing this requirement where PIN-based or other non-PKI based signature processes are employed.

3.2000(f)(1) – The definition of "precise" routing of the submission needs to be clarified in the preamble or explained in the rule. It was not clear just what sort of information would be required or how precise the routing information would need to be. Specifically, it is requested that EPA provide an example of the information that would needed for the Transaction Record for an Internet submission via a SSL connection.

3.3000(b)(a) – It is suggested that the language in 3.3000(b) be clarified to state that, "the state, tribe, or local government must demonstrate, in writing, that records maintained electronically…"